

IN THE UNITED STATED DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JUDY A. FOSTER,)
)
)
Plaintiff,)
)
)
vs.) Case No. 3:11-cv-01216
) Judge Haynes/Magistrate Bryant
)
)
SPRING MEADOWS HEALTH)
CARE CENTER, LLC,) JURY DEMAND
)
)
Defendant.)

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS IN LIMINE

Comes now Plaintiff Judy Foster and in response
to Defendant's Motions in Limine would state as follows:

Motion in Limine #1

Plaintiff intends to have Sara Hughes testify in person.
Thus, Hughes will be testifying upon matters within her personal
knowledge. Such will not be hearsay.

Plaintiff's claims for discrimination, race and age, are
based upon younger white employees being disciplined less
severely or not at all for conduct similar to the complained of
actions of Plaintiff. One of the younger white women at issue is
Sara Hughes.

LAW AND ARGUMENT

Plaintiff anticipates that Hughes will testify that she

violated the policies of Defendant in attempting to lift a patient without a lift, that she dropped the patient, that the patient died as a result thereof, and that she was not disciplined for this conduct. Plaintiff was fired for leaving the facility, by Defendant's account, without telling anyone. According to Defendant's Termination Memorandum, this conduct had the potential to cause harm to patients. However, Hughes' violation of policy caused harm. Foster is fired and Hughes is not even written up.

In *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012), the plaintiff was fired after 32 years of service for telling her psychiatrist that she was having thoughts of killing her supervisor. However, two males had recently threatened another employee at knife point and received only one week suspensions. The Postal Service maintained a no tolerance policy for threats to employees. The Postal Service maintained that these were not appropriate comparators because the threats of the men were viewed as an isolated incident and were just 'horseplay'. In reversing the trial court, the Seventh Circuit envisioned cases where:

[t]o require that employees always have to engage in the exact same offense as a prerequisite for finding them similarly situated would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination.

Citing *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (*en banc*) (abrogated on other grounds).

In the case before this Court, Foster is accused of conduct that might have lead to harm - while Hughes committed policy violations that did lead to serious injury and death. Such is relevant in this matter and should be heard by the jury.

Plaintiff submits that said Motion is not taken well and should be denied.

Motion in Limine #2

____ Plaintiff does not intend to ask questions of witnesses without personal knowledge. However, Plaintiff does intend to ask witnesses who have advised that they have been treated more severely than white employees for the same conduct of such matters and their observations of Plaintiff's treatment.

LAW AND ARGUMENT

Me too evidence is admissible in discrimination cases and may be the only way a plaintiff can show discrimination.

In *Bandera v. City of Quincy*, 344 F.3d 47 (1st Cir. 2003), a sexual harassment lawsuit, the trial court ruled that witnesses could testify about their own experiences. The First Circuit held that:

Coletta's recitation of her own experience was relevant. The most obvious relevance of Coletta's testimony—that she had suffered similar harassment and reported it to Frane—was to show liability on the part of supervisory

officers...

Similarly, in an Age Discrimination in Employment case, *Minshall v. McGraw Hill Broadcasting Company, Inc.*, 323 F.3d 1273 (10th Cir. 2003), evidence that other older employees were treated adversely was admissible and supported the jury finding of discrimination. See also, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (Oswalt, roughly 24 years younger than petitioner, corroborated that there was an "obvious difference" in how Chestnut treated them).

Plaintiff does not intend to ask the same questions as she did in the discovery depositions, nor does she intend to ask questions about subjects she knows witnesses do not have personal knowledge thereof. Plaintiff does intend to ask about witnesses observations of Plaintiff's treatment, disparities in treatment, and how black employees were treated at Spring Meadows.

Motion in Limine #3

Plaintiff alleges that she, an older black female, was treated more harshly in disciplinary actions than younger white employees.

LAW AND ARGUMENT

To satisfy the similarly-situated requirement, a plaintiff must demonstrate that the comparable employee is similar "in all of the relevant aspects." *Ercegovich v. Goodyear Tire & Rubber*

Co., 154 F.3d 344, 352 (6th Cir. 1998). The Sixth Circuit stated in *Ercegovich*:

The plaintiff need to demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, as this court has held in *Pierce* [v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994)], the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the relevant aspects."

Martin v. Toledo Cardiology Consultants, Inc., 548 F.3d 405 (6th Cir. 2008). A plaintiff need only show that she and her proposed comparators engaged in acts of comparable seriousness. *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 751 (6th Cir. 2012); *Kucia v. Southeast Arkansas Community Action Corporation*, 284 F.3d 944 (8th Cir. 2002) (although not identically situated to plaintiff, these employees were sufficiently "similarly situated" to allow the jury to draw inferences from the disparate treatment); *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012); *Peirick v. Indiana University-Purdue University Indianapolis*, 510 F.3d 681, 689 (7th Cir. 2007) (university tennis coach accused of using abusive language, unsafe driving, leaving students behind during a road trip and pitting students against administration was similarly situated to coach who did not engage in the exact same conduct but who violated the very same rules); *Ezell v. Potter*, 400 F.3d 1041, 1050 (7th Cir. 2005) (mail carrier accused of taking too long a lunch was similarly situated to another

carrier who had lost a piece of certified mail); *Rodgers v. White*, 657 F.3d 511 (7th Cir. 2011)(a supervisor may even be a similar-situated comparator).

In this case, Plaintiff, Hughes and Vokevich were all CNAs or certified nurse assistants, were all supervised by the same supervisor and were all held to the very same standards. They are sufficiently "similarly situated" to allow the jury to draw inferences as to any disparate treatment. Such issues are the province of the jury. *Coleman v. Donahue*, 667 F.3d 835 (7th Cir. 2012).

Plaintiff submits that said Motion is not taken well and should be denied.

Motion in Limine #4

Plaintiff has identified as a potential exhibit Defendant's spreadsheet showing the names, positions, ages and race of Defendant's own employees.

LAW AND ARGUMENT

Plaintiff does not intend to use this spreadsheet as statistical evidence to show the racial makeup at Defendant. This is a disparate treatment case not a disparate impact case. Plaintiff may use this race to show the race and/or position of employees not present for trial.

Plaintiff submits that said Motion is not taken well and should be denied.

Motion in Limine #5

____ Plaintiff does not intend to ask Ms. Henderson about Sara Hughes. Ms. Hughes has been located and will appear in person at trial. A proper foundation will be laid for Ms. Henderson as to how everyone knew that Plaintiff was leaving on Sunday. As to the matters Ms. Henderson does not have personal knowledge of, these facts will be gleamed from other witnesses.

Respectfully submitted,

/s/ Debra A. Wall

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Response to Motions in Limine has been sent to undersigned counsel via the court's electronic filing system:

Kathryn W. Olita, BPR 023075
Erik Fuqua, BPR No. 029972
Counsel for Defendants
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on the 29th day of March, 2013.

/s/ Debra A. Wall
Debra A. Wall